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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JP MORGAN CHASE BANK, N.A., Plaintiff and Respondent, v. KIRK CARMICHAEL et al., Defendants and Appellants.	D063531 (Super. Ct. No. 37-2010-00092800-CU-OR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

MacDuff W. Collins for Defendants and Appellants.

AlvaradoSmith, John M. Sorich, Sung-Min Christopher Yoo and Jenny L. Merris for Plaintiff and Respondent.

Defendants Kirk Carmichael and Dawn Carmichael (together, the Carmichaels) appeal a judgment entered in favor of JP Morgan Chase Bank, N.A. (Chase) after the trial court granted Chase's summary judgment motion. The Carmichaels appeal, contending (1) Chase failed to prove ownership or standing, (2) the trial court erred when it denied

their request for a continuance, (3) the trial court abused its discretion when denying their objection to a declaration, (4) the trial court erred in granting the motion because this violated their right to a jury trial, and (5) the trial court improperly took judicial notice of a document. We reject the Carmichaels' contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2007, the Carmichaels obtained a residential loan in the amount of $2,400,000 (the Loan) from Washington Mutual Bank, FA (WaMu) in connection with real property located in Poway, California (the Property). The Loan was secured by a Deed of Trust encumbering the Property that was recorded with the San Diego County Recorder's Office. The following year, the Office of Thrift Supervision closed WaMu and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. Chase acquired certain assets and liabilities of WaMu from the FDIC acting as receiver, including WaMu's interest in the Loan, under a Purchase and Assumption Agreement (PAA). Chase is the owner of the Loan and the current beneficiary of the Loan and Deed of Trust. The Carmichaels later defaulted under the Loan and Deed of Trust. In January 2010, California Reconveyance Company, as the trustee, recorded a Notice of Default and Election to Sell under Deed of Trust (Notice of Default).

In February 2010, the Carmichaels recorded a Substitution of Trustee/Beneficiary that eliminated California Reconveyance Company and Chase as the current trustee and beneficiary, and substituted Placido Fausto Soliven as trustee. Chase did not authorize the Carmichaels to execute or record the Substitution of Trustee/Beneficiary, to substitute the trustee or beneficiary under the Loan or Deed of Trust, or intend to relinquish its

status as beneficiary under the Loan and Deed of Trust. Thereafter, the Carmichaels recorded four additional documents: (1) a Full Reconveyance of the Loan, falsely claiming that all sums secured by the Deed of Trust had been fully paid; (2) a Modification of Deed of Trust, falsely claiming that all sums secured by the Deed of Trust had been fully paid; (3) a Warranty Deed, not authorized by Chase, indicating that the Carmichaels granted title to the Property to Running Deer Ministries; and (4) a Rescission of Notice of Default and Election to Sale under Deed of Trust, also not authorized by Chase.

After California Reconveyance Company as the trustee recorded a Notice of Trustee's Sale, Soliven as the alleged trustee, and Randy Froide as the alleged beneficiary executed a Rescission of Notice of Trustee's Sale. Chase as the true beneficiary did not authorize the execution or recordation of the Rescission of Notice of Trustee's Sale and the outstanding balance of the Loan has not been paid.

Chase filed this action seeking to cancel the documents recorded by the Carmichaels due to their unauthorized and fraudulent nature. Chase sought a declaration that the Deed of Trust owned by it continues to encumber the property. It also sought an equitable lien on the Property to secure amounts due Chase and, in the alternative, damages according to proof. After the trial court overruled the Carmichaels' demurrer to the complaint, the Carmichaels filed a cross-complaint. The trial court sustained Chase's demurrer to the cross-complaint without leave to amend and entered a judgment in favor of Chase on the cross-complaint.

Chase filed a motion for summary judgment, alternatively summary adjudication, arguing that there were no triable issues of material fact as to the claims asserted in its complaint. After ruling on various evidentiary objections and requests for judicial notice and denying the Carmichaels' request for a continuance, the trial court granted the motion and entered a judgment in favor of Chase. The Carmichaels timely appealed.

DISCUSSION

I. *General Legal Principles*

A plaintiff seeking summary judgment has the burden to produce admissible evidence on each element of its causes of action entitling it judgment. (Code Civ. Proc., § 437c, subd. (p)(1), undesignated statutory references are to this code.) If the plaintiff persuades the trial court that there are no triable issues of material fact (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. 11 (*Aguilar*)), the burden shifts to the defendant "to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (§ 437c, subd. (p)(1).) "Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence." (§ 437c, subd. (b)(3).) It is insufficient if the opposing party simply raises issues as to the credibility of the moving party's declarations. (§ 437c, subd. (e).)

To avoid summary judgment, the opposing party must present admissible evidence. (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 11.) "[T]he opposition to summary judgment will be deemed insufficient when it is essentially conclusionary, argumentative or based on conjecture and speculation." (*Ibid.*) "When no

affidavits are filed in opposition to a motion for summary judgment, the court is entitled to accept as true the facts alleged in the movant's affidavits, provided they are within the personal knowledge of the affiant and are facts to which he could competently testify." (*Leo F. Piazza Paving Co. v. Foundation Constructors, Inc.* (1981) 128 Cal.App.3d 583, 589.)

We review the trial court's decision granting summary judgment de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) "Appellate briefs must provide argument and legal authority for the positions taken. 'When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]'" (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.) It is insufficient to simply state general legal principles or legal authority; rather, the appellant must offer argument as to how the court erred and apply the law to the circumstances before the court. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699.)

II. *Chase's Standing*

In ruling on the motion, the trial court noted that the Carmichaels failed to present any admissible evidence to controvert the undisputed facts listed in Chase's separate statement. Thereafter, the trial court reviewed the elements of each cause of action alleged by Chase, found Chase presented admissible evidence and that the Carmichaels failed to produce admissible evidence showing the existence of a triable issue of material fact as to Chase's claims for cancellation of instruments, declaratory relief or imposition of an equitable lien.

The Carmichaels did not argue in their opening brief that the trial court erred in granting summary judgment because Chase failed to meet its burden of persuasion. Nor did they claim to have met their burden of showing the existence of triable issues of material fact. Instead, the Carmichaels' challenge to the granting of the motion is limited to arguing that WaMu's assets did not pass to Chase and that Chase lacked standing to request relief. Accordingly, our review is limited to this issue. (*Pfeifer v. Countrywide Home Loans, Inc.* (2012) 211 Cal.App.4th 1250, 1282 [issues not raised in an appellant's opening brief are deemed waived or abandoned].)

Except as otherwise provided by statute, "[e]very action must be prosecuted in the name of the real party in interest . . . ." (§ 367.) The real party in interest is a person who owns or holds title to the claim or property involved, as opposed to others who may be interested or benefited by the litigation. (*Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566.) Real party in interest issues are often discussed in terms of plaintiff's "standing" to sue. (*Charpentier v. Los Angeles Rams Football Co.* (1999) 75 Cal.App.4th 301, 307 [party who is not the real party in interest lacks standing to sue because claim belongs to someone else].)

The trial court rejected the Carmichaels' standing argument, noting that Chase presented admissible evidence showing it acquired WaMu's assets, including its interest in the Loan and that it is the current beneficiary of the Loan and Deed of Trust. The Carmichaels have not shown that the trial court erred.

Chase established, and the Carmichaels did not dispute, that the FDIC had legal authority to transfer WaMu's assets to Chase. (See generally 12 U.S.C. § 1821(d)(2).)

Chase presented the declaration of Eric M. Waller, a Senior Research Specialist with Chase, who attached a true and correct copy of the PAA whereby Chase acquired its interest in WaMu's assets. The Carmichaels presented no evidence challenging the authenticity or completeness of the PAA attached to Waller's declaration.

Paragraph 3.1 of the PAA stated that Chase "purchase[d] all mortgage servicing rights and obligations of" WaMu. Paragraph 6.1 of the PAA stated that the FDIC assigned and transferred to Chase certain records pertaining to assets including "deeds, mortgages, abstracts, surveys, and other instruments or records of title pertaining to real estate or real estate mortgages." Accordingly, the PAA established that Chase acquired WaMu's interest in the Loan and Chase was the real party in interest with standing to sue to protect its interests.

To avoid this result, the Carmichaels rely on a Michigan Supreme Court case, *Kim v. JPMorgan Chase Bank, N.A.* (2012) 493 Mich. 98 (*Kim*), to argue that the PAA did not transfer WaMu's assets to Chase. The Carmichaels misread *Kim*. In *Kim,* the FDIC sold the plaintiffs' mortgage, and most of WaMu's assets, to Chase, using a purchase and assumption agreement. (*Kim*, *supra*, 493 Mich. at p. 103.) Chase later foreclosed on plaintiffs' property by advertisement. (*Id.* at p. 104.) Because the transfer occurred via a sale, rather than by operation of law, at issue in *Kim* was whether Chase was required to record the transfer of the mortgage from the FDIC to Chase under a Michigan statute which required that a mortgage assignment be recorded before initiation of a foreclosure by advertisement. (*Id.* at p. 110.) Based on this failure to comply with the statute, the foreclosure was voidable upon a showing of prejudice to the plaintiffs. (*Id.* at pp. 115-

116.) Thus, *Kim* addressed a Michigan statute and does not stand for the broad proposition that the PAA failed to transfer WaMu's assets to Chase.

For the first time in their reply brief, the Carmichaels argue that California Commercial Code section 3201, pertaining to negotiation, required that the FDIC endorse the Note or, in the alternative, issue a blanket endorsement for each mortgage note acquired through the PAA. We deem this argument forfeited because it was not raised below or in the Carmichaels' opening brief. (*Pfeifer v. Countrywide Home Loans, Inc.*, *supra*, 211 Cal.App.4th at p. 1282; *People v. Newton* (2007) 155 Cal.App.4th 1000, 1005 ["we do not consider an argument first raised in a reply brief, absent a showing why the argument could not have been made earlier"].) Even assuming, without deciding, that Commercial Code section 3201 required the FDIC to endorse the Note, the Carmichaels have not shown that the assignment is void, rather than merely voidable. (7 Cal.Jur.3d (2011) Assignments, § 43, p. 70 ["Where an assignment is merely voidable at the election of the assignor, third parties, and particularly the obligor, cannot . . . successfully challenge the validity or effectiveness of the transfer."]; *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 514-515 [the only claim that arises from the improper transfer of interest in a Loan is between transferor and transferee as assignment merely substituted one creditor for another, without changing obligations under the note].)

The Carmichaels next argue the trial court abused its discretion by overruling their objections to Waller's declaration and relying on Waller's declaration, Chase's sole declarant, to grant the motion. We reject this argument.

A summary judgment motion can be supported by declarations. (§ 437c, subd. (b)(1).) Declarations must "be made . . . on personal knowledge, . . . set forth admissible evidence, and . . . show affirmatively that the [declarant] is competent to testify to the matters stated in the affidavits or declarations." (§ 437c, subd. (d).) Waller's declaration stated he had personal knowledge of the litigation and other facts set forth in the declaration and stated his competency to testify. Accordingly, Waller's declaration satisfied the statutory requirements and was properly considered by the trial court.

The Carmichaels further contend the court erred by refusing to consider Waller's deposition transcript when ruling on the motion as the transcript would have impugned Waller's declaration. The Carmichaels presented Waller's deposition transcript and request that we consider it in deciding this appeal. Chase objected to the request and we issued an order denying the request.

In ruling on the motion, the trial court declined to consider Waller's deposition transcript. Nonetheless, the court stated at the hearing on the motion that it read the transcript and found it did not controvert what was in Waller's declaration. Additionally, Chase's opposition to our consideration of this material on appeal does not challenge the authenticity of the deposition transcript. Accordingly, in the interest of justice, we deem the Carmichaels' request "to take evidence" as a request to augment the record on appeal and grant the request to augment. (Cal. Rules of Court, rule 8.155(a)(1)(A).) Our prior order dated February 26, 2014, denying the request is vacated.

One of the Carmichaels' arguments on appeal is that Chase lacked standing because it did not possess the original Note secured by the Deed of Trust. Waller's

deposition testimony established that Chase does possess the original Note. Namely, Waller testified that after Chase acquired WaMu's assets, he received the "origination file, which contain[ed] the original documents," Waller saw the original Note and Deed of Trust and these documents are in Chase's possession. Thus, assuming without deciding that Chase was required to have physical possession of the original Note, Waller's deposition testimony established this fact.

Although not entirely clear, it appears the Carmichaels assert in their opening brief that the signature of Deborah Brignac on the Notice of Trustee's Sale recorded by Chase is a forgery. In opposition to the summary judgment motion, the Carmichaels stated that they engaged Sylvia Kessler, a forensic document examiner, to examine Brignac's signature and requested that the trial court take judicial notice of Kessler's vitae, "Letter of Opinion" and "Illustrations" (collectively, the Kessler documents). In ruling on the motion, the trial court denied the request for judicial notice, finding the Kessler documents were not the proper subjects of judicial notice. The court also granted Chase's evidentiary objections to these documents, finding that the exhibits were hearsay; the Carmichaels failed to establish their foundation or authenticity and failed to provide any declaration as to the personal knowledge of Sylvia Kessler regarding the documents.

The Carmichaels did not challenge the trial court's rulings in their opening brief. For the first time in their reply brief, the Carmichaels argue the trial court abused its discretion when it failed to admit into evidence the Kessler documents. We deem this argument forfeited. (*People v. Newton, supra,* 155 Cal.App.4th at p. 1005.)

On appeal, the Carmichaels filed a request to take evidence, essentially asking us to take judicial notice of the Kessler documents. The request is denied. The Kessler documents do not fall into any of the mandatory or discretionary judicial notice categories. (Evid. Code, §§ 451, 452.) Moreover, even when a court takes judicial notice of a document, it does not take notice of the truth of matters stated therein. (*Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 987-988.)

Nonetheless, even if we were to take judicial notice of the Kessler documents and assuming they establish Brignac did not sign some of the documents, the Carmichaels have not shown how this creates a triable issue of material fact sufficient to avoid summary judgment as they have not presented evidence showing these assumed irregularities prejudiced them or voided any of the documents. (*Mendoza v. JPMorgan Chase Bank, N.A.* (2014) 228 Cal.App.4th 1020, review granted November 12, 2014, S220675.)

III. *Denial of Discovery*

A. Background

In November 2012, the trial court granted the Carmichaels' motion for a commission to take the out-of-state deposition of Cynthia Riley. In January 2013, the Carmichaels moved ex parte to compel the deposition of Cynthia Riley and continue the hearing on Chase's summary judgment motion. The trial court denied the Carmichaels' ex parte application.

In their opposition to the summary judgment motion, the Carmichaels noted that they subpoenaed business records crucial to their defense and that Riley had not yet been

deposed. In their conclusion, the Carmichaels requested that the trial court deny the motion or grant them sufficient time to complete discovery. The trial court interpreted these statements as a request for a continuance and denied the request on the ground the Carmichaels failed to offer a declaration which provides that essential evidence may exist, but cannot, for reasons stated, be presented.

B. Analysis

Citing subdivision (h) of section 437c, the Carmichaels argue the lack of a continuance to depose Riley denied them a fair hearing. We disagree.

The summary judgment statute provides that if the party opposing the motion shows by declaration that essential evidence "may exist but cannot, for reasons stated, then be presented, the court shall deny the motion" or continue it for a reasonable period, or "make any other order as may be just." (§ 437c, subd. (h).) If the opposing party makes the requisite showing, a continuance is "virtually mandated." (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.) Where a declaration is not submitted or is deficient, a continuance is within the trial court's discretion. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716.) A continuance request may be made in the opposition papers or by ex parte motion any time on or before the date the opposition to the motion is due. (§ 437c, subd. (h); *Ambrose v. Michelin North America, Inc.* (2005) 134 Cal.App.4th 1350, 1353.)

Here, neither the ex parte application, nor the Carmichaels' opposition to the motion contained the requisite declaration. Accordingly, the trial court did not abuse its discretion when it denied the Carmichaels' continuance request. Moreover, the

Carmichaels failed to show how Riley's testimony was relevant to their defense. The Carmichaels pointed out that some copies of the purported "original" Note contained Riley's signature in her capacity of the Vice President of WaMu, but other copies did not contain the signature. Even assuming such a discrepancy exists, the Carmichaels do not explain how this creates a defense to Chase's claims as they never challenged WaMu's status as the original lender under the Note with the authority to transfer the Note.

IV. *Alleged Violation of Carmichaels' Right to Jury Trial*

The Carmichaels contend the granting of the summary judgment motion violated their constitutional right to a jury trial. We disagree.

Litigants have a constitutional right to a jury trial. (U.S. Const., 7th Amend.; Cal. Const., art. I, § 16.) The right to a jury trial, however, pertains solely to questions of fact. (*Hung v. Wang* (1992) 8 Cal.App.4th 908, 927.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar*, *supra*, 25 Cal.4th at p. 843.) Summary judgment can only be granted where the moving party shows there are no triable issues of material fact. (§ 437c, subd. (c).)

We reject the Carmichaels' contention that the granting of the summary judgment motion violated their right to a jury trial because the trial court found they failed to present evidence showing the existence of any triable issue of material fact that required a jury. In other words, the granting of the motion did not deny the Carmichaels their right to a jury trial; rather, it recognized that a jury trial was unnecessary.

V. *Judicial Notice*

Relying on *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872 (*Jolley*), the Carmichaels assert the trial court erred when it took judicial notice of the PAA when ruling on Chase's demurrer to their first amended cross-complaint. As Chase correctly notes, the trial court sustained the demurrer without leave to amend and entered a judgment in favor of Chase in March 2012. The time to appeal this ruling has expired. (See generally Cal. Rules of Court, rule 8.104.)

In ruling on the summary judgment motion, Chase did not request judicial notice of the PAA. Rather, Waller attached a true and correct copy of the PAA to his declaration. Even if Chase had requested judicial notice of the PAA in its summary judgment motion, the Carmichaels' reliance on *Jolley* is misplaced. In *Jolley*, the PAA and its legal effect were reasonably subject to dispute because the opposing party insisted that the copy submitted was not the actual PAA. (*Jolley, supra*, 213 Cal.App.4th at pp. 889-890.) Here, the Carmichaels did not dispute that the copy attached to Waller's declaration was a true and correct copy of the PAA. (*Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 747-748, 760-761 [judicial notice of PAA attached to the request for judicial notice and published to the public on the official FDIC Web site was proper as party opposing demurrer failed to show the matter was reasonably subject to dispute]; *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264-265 [court may take judicial notice of the fact of the existence and legal effect of legally operative documents where not subject to reasonable dispute].)

DISPOSITION

The judgment is affirmed. Respondent is entitled to recover its costs on appeal.

MCINTYRE, J.

WE CONCUR:

MCCONNELL, P. J.

MCDONALD, J.